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LEW YEE HONG & ANOR v. KETUA SETIAUSAHA, KEMENTERIAN DALAM NEGERI & ORS

HIGH COURT MALAYA, KUALA LUMPUR
FAIZAH JAMALUDIN J
[JUDICIAL REVIEW NO: WA-25-198-10-2016]
B 30 SEPTEMBER 2019

ADMINISTRATIVE LAW: *Judicial review – Decision of Director General of National Registration Department ('NRD') of Malaysia – Citizenship – Child born to Malaysian citizen father and non-citizen mother – Biological parents not married*
C *to each other at time of child's birth – Child accorded with non-citizen status – Parents' marriage registered one year after child's birth – Application to register child as citizen rejected by NRD without reasons – Whether court seized with jurisdiction to entertain applications for order of certiorari and for declarations in respect of citizenship – Federal Constitution, ss. 14(1)(b), 15A & 15(2)*

D

CONSTITUTIONAL LAW: *Citizenship – Application for – Child born to Malaysian citizen father and non-citizen mother – Biological parents not married to each other at time of child's birth – Parents' marriage registered one year after child's birth – Application to register child as citizen rejected by National Registration Department without reasons – Whether child rendered legitimate by*
E *subsequent marriage of parents – Whether child acquired citizenship by operation of law – Whether child satisfied requirements in s. 44(1)(a) of Specific Relief Act 1950 – Whether child had legitimate expectation to acquire citizenship of Malaysia – Whether child ought to be given Malaysian birth certificate and identity card – Federal Constitution, ss. 14(1)(b), 15A & 15(2)*

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The second applicant was accorded with a non-citizen status as, at the time of her birth, her biological Malaysian father ('the first applicant') and non-citizen mother were not legally married. After registering their marriage on 31 January 2008, a year after the second applicant's birth, the first applicant made three applications to Jabatan Pendaftaran Negara ('JPN') for the
G second applicant to be accorded a Malaysian citizenship. In all three applications, JPN gave the first applicant Form B *ie*, an application form for citizenship by registration under art. 15A of the Federal Constitution ('FC'); not forms of application for citizenship by operation of law under art. 14(1)(b), or for citizenship by registration under art. 15(2) of the FC. The
H first respondent did not respond to the first application and rejected the second and third applications without giving any reasons. Following the rejection of the third application ('the impugned decision'), the applicants filed the present application for (i) an order of *certiorari* to quash the first respondent's decision; (ii) an order of *mandamus* directing the respondents to
I issue a Malaysian citizenship certificate and Malaysian MyKad identity card

to the second applicant; (iii) a declaration that the second applicant was a citizen of Malaysia by operation of law under art. 14(1)(b) and/or art. 15A of the FC; (iv) it was the second applicant's legitimate expectation to acquire a citizenship of Malaysia to own rights as a Malaysian citizen; and (v) an award of damages for the respondents' unconstitutional actions in rejecting the application for citizenship. Objecting to the application, the respondents argued that (i) the court was not seized with the jurisdiction to review the respondents' decision under Part III of the FC; (ii) the second applicant failed to fulfil the requirements under art. 14(1)(b) of the FC, read together with Part II, s. 1(a) of the FC, to acquire citizenship by operation of law, as she was born out of wedlock to a non-citizen mother at the time of her birth; and (iii) the court could not make an order of *mandamus* directing the respondents to issue a Malaysian citizenship certificate and a MyKad identity card as the second applicant failed to satisfy the requirements in s. 44(1)(a) of the Specific Relief Act 1950 ('SRA'). The issues that arose for adjudication were (i) whether this court was seized with the jurisdiction to entertain applications for an order of *certiorari* and for declarations in respect of citizenship notwithstanding the ouster clause in s. 2 of Part III of the Second Schedule of the FC; and (ii) whether a child born out of wedlock in Malaysia, to a Malaysian father and non-citizen mother, but who was subsequently legitimised under the Legitimacy Act 1961 ('Act') by virtue of her parents' marriage, a Malaysian citizen by operation of law under art. 14(1)(b) of the FC.

Held (allowing application in part):

(1) Notwithstanding the ouster clause in s. 2 of Part III of the Second Schedule to the Federal Constitution, this court had the jurisdiction to consider the applicants' application for an order of *certiorari* to quash the respondent's decision and for the declarations sought. Moreover, as the respondents did not make any decision of the second applicant's citizenship by operation of law under art. 14(1)(b) of the FC, it followed that there was no review of any decision made by the respondents under art. 14(1)(b) of the FC. The respondents' decision to reject the application for citizenship was made only under art. 15A of the FC. The first applicant's application for citizenship in Form B was only for citizenship by registration under art. 15A of the FC. Since the first applicant did not make any applications for citizenship under arts. 14(1)(b) and 15(2), no decision could be made by the respondents to reject applications under these articles. (paras 46-50)

(2) The Federal Government has the prerogative, under art. 15A, to grant citizenship by registration to any person below the age of 21 years 'in such special circumstances as it thinks fit'. Pursuant to s. 4 of Part III of the Second Schedule to the FC, this court did not have the

jurisdiction to make an order of *certiorari* to quash the Federal Government's decision under art. 15A not to cause a child under the age of 21 years to be registered as a citizen. The correct avenue for appeal, pursuant to s. 4 of Part III of the Second Schedule to the FC, was for the applicants, as the persons aggrieved by the decision of the first respondent, to appeal to the Minister. The respondents' decision in not using the prerogative power to accord the second applicant citizenship by registration pursuant to art. 15A was not unconstitutional. Therefore, this court dismissed the application for an order of *certiorari* to quash the first respondent's decision under art. 15A. (paras 67, 69 & 70)

(3) The second applicant was rendered legitimate on 31 January 2008, pursuant to ss. 3 and 4 of the Act upon the registration of her parents' marriage. It would not be necessary for her to apply to the High Court for a decree declaring that she was the legitimate child of her parents. As a person rendered legitimate by virtue of ss. 3 and 4 of the Act, the second applicant was entitled to rely on the first applicant's citizenship for purposes of art. 14(1)(b) and s. 1(a) of the Second Schedule, Part II of the FC. The second applicant's personal right as a person who is entitled to citizenship by operation of law would be injured if the respondents fail to issue her a Malaysian citizenship certificate and a MyKad identity card. The requirements in s. 44(1)(a) of the SRA were satisfied. The court was seized with the jurisdiction to make an order of *mandamus* directing the respondents to issue a Malaysian citizenship certificate and a Malaysian MyKad identity card to the second applicant. Additionally, by reason of her legitimisation, the second applicant also had a legitimate expectation to acquire a citizenship of Malaysia and to own rights as a Malaysian citizen. (paras 56, 60, 64 & 65)

(4) The second applicant was a Malaysian citizen, by operation of law under art. 14(1)(b) and s. 1(a) of Part II of the Second Schedule to the FC. An order of *mandamus* was made for the respondents to issue the second applicant with a Sijil Kewarganegaraan Malaysia and a Malaysian MyKad identity card. (paras 3, 71 & 72)

Case(s) referred to:

Ho Kooi Sang v. Universiti Malaya [2004] 5 CLJ 445 HC ***(refd)***

Koon Hoi Chow v. Pretam Singh [1972] 1 LNS 56 HC ***(refd)***

Ku Luwante (An Infant) v. Government Of Malaysia & Anor [1977] 1 LNS 49 HC ***(refd)***

Lim Jen Hsian & Anor v. Ketua Pengarah Jabatan Pendaftaran Negara & Ors [2017] 8 CLJ 412 CA ***(refd)***

Madhuvita Janjara Augustin (Suing Through Next Friend, Margaret Louisa Tan) v. Augustin Lourdsamy & Ors [2018] 4 CLJ 758 CA ***(refd)***

Mak Sik Kwong v. Minister of Home Affairs Malaysia [1975] 1 LNS 96 HC ***(refd)***

Legislation referred to:
Federal Constitution, arts. 8, 14(1)(b), 15(2), 15A, 18, 31, Second Schedule Part II s. 1(a), Part III ss. 2, 4(1), 17
Legitimacy Act 1961, ss. 2, 3, 4
Rules of Court 2012, O. 53 r. 1
Specific Relief Act 1950, s. 44(1)(a)

For the applicant - Annou Xavier & Larissa Ann Louis; M/s Azri, Lee Swee Seng & Co
For the respondents - Maisarah Juhari & Isyishad Ismail; SFCs

Reported by Najib Tamby

JUDGMENT

Faizah Jamaludin J:

Introduction

[1] This is my judgment in respect of a substantive application for judicial review under O. 53 r. 1 of the Rules of Court 2012 by the applicants. The High Court had granted the applicants leave on 13 December 2016 to apply *inter alia* for the following reliefs:

(i) an order of *certiorari* to quash the first respondent's decision dated 5 August 2016;

(ii) an order of *mandamus* directing the respondents to issue a Malaysian citizenship certificate and a Malaysian MyKad Identity Card to the second applicant;

(iii) a declaration that the second applicant is a citizen of Malaysia by operation of law under art. 14(1)(b) and/or art. 15A of the Federal Constitution;

(iv) a declaration that it is the second applicant's legitimate expectation to acquire citizenship of Malaysia and to own rights as a Malaysian citizen; and

(v) an award of damages for the respondents' unconstitutional actions in rejecting the applicants' application for citizenship.

[2] After considering the facts, the provisions of the Federal Constitution and the Legitimacy Act 1961, the applicable case laws and the submissions of learned counsel, I found that:

(i) the second applicant was legitimised from the date of her biological parents' marriage pursuant to the Legitimacy Act 1961; and

(ii) the second applicant is a citizen of Malaysia by operation of law pursuant to art. 14(1)(b) and s. 1(a) of Part II of the Second Schedule to the Federal Constitution.

[3] By reason of those findings, I made a declaration that the second applicant is a citizen of Malaysia by operation of law under art. 14(1)(b) of the Federal Constitution. I also made an order of *mandamus* against the respondents to issue a Sijil Kewarganegaraan Malaysia (Malaysian citizenship certificate) and a Kad Pengenalan MyKad Malaysia (Malaysian MyKad Identity Card) for the second applicant.

[4] The full grounds of my decision are set out in this judgment.

Facts

[5] The first applicant is the biological father of the second applicant. The second applicant is a 12-year minor who was born in Perak on 4 November 2006. At the time of the second applicant's birth, the first applicant was not legally married to the second applicant's biological mother, Ms Perlita Martin Diaz. Ms Diaz is a citizen of the Republic of the Philippines. No evidence was adduced during the hearing whether or not Ms Diaz was, at the time of the second applicant's birth, permanently resident in Malaysia.

[6] At her birth, the Registrar of Birth and Deaths Malaysia issued the second applicant with a birth certificate under the Births and Deaths Registration Act 1957 with citizenship status of non-citizen ("Bukan Warganegara").

[7] The first applicant registered his marriage to Ms Diaz, over a year after the second applicant's birth, on 31 January 2008.

[8] On 20 February 2008, the first applicant made the first of his three applications to the Jabatan Pendaftaran Negara, Perak ("JPN") for the second applicant to be accorded Malaysian citizenship. The first applicant did not receive any reply to his first application. He then made a second application on 13 October 2011. On 17 December 2012, the first respondent informed the first applicant that his application was unsuccessful. The first respondent did not give any reasons for the rejection. On 9 September 2013, the first applicant made a third application for the second applicant's citizenship to JPN. This third application was rejected by the first respondent on 5 August 2016 ("the impugned decision"). Again, no reasons were given for the rejection. The first respondent's decision to reject the third application on 5 August 2016, is the impugned decision, which is the subject-matter of this judicial review.

[9] The forms given by the JPN to the first applicant for all his three applications were borang B ie, an application form for citizenship by registration under art. 15A of the Federal Constitution. Under art. 15A, the Federal Government has the right to grant citizenship by registration to children under 21 years in "such special circumstances as it thinks fit". No forms for application for citizenship by operation of law under art. 14(1)(b) or for citizenship by registration under art. 15(2) of the Federal Constitution were given by the JPN to the first applicant.

[10] After the rejection of the third application, the applicants filed an application in the High Court for leave for a judicial review of the respondent's impugned decision and for *inter alia* a declaration that the second applicant is a Malaysian citizen by operation of law under art. 14(1)(b) and/or by registration under art. 15A of the Federal Constitution.

The Applicants' Case

[11] It is the applicants' case that the second applicant is a Malaysian citizen by operation of law under art. 14(1)(b) or by registration under art. 15A of the Federal Constitution. They also contend that the applicants have a legitimate expectation that the second applicant be accorded Malaysian citizenship.

[12] Learned counsel for the applicants, Mr Annou Xavier, submits that the first respondent's failure to give any explanation for the rejection of the applications for citizenship amounts to procedural unfairness. He contends that the respondents took into account irrelevant considerations and failed to take into account relevant considerations when they made the decision to reject the citizenship application for the second applicant under art. 15A of the Federal Constitution. The applicants further contend that the respondents had acted illegally and/or unreasonably in dismissing the application for citizenship and in denying the applicants' legitimate expectation that the second applicant be granted Malaysian citizenship.

[13] Mr Xavier says that the second applicant is properly and lawfully entitled to be registered as a citizen under art. 15A of the Federal Constitution. He argues that the second applicant is a person "who can be deemed fit" to be registered based on the Parliamentary intention as found in the text and the context of citizenship provisions in which art. 15A was introduced, public policy found in various legislation involving children, the international norms ascribed to by Malaysia as a signatory to the United Convention on the Rights of the Child, and the guarantees on procedural and substantive fairness in art. 8 of the Federal Constitution.

The Respondents' Case

[14] The respondents' case is that the Government's decision on citizenship is non-justiciable. Learned Senior Federal Counsel ("SFC"), Puan Maisarah Juhairi, submits that this court does not have the jurisdiction to review the respondents' decision under Part III of the Federal Constitution. She argues that, therefore, the applicants' application should be dismissed.

[15] Puan Maisarah cites art. 31 of the Federal Constitution read together Part III of Second Schedule to the Federal Constitution and the High Court case of *Ku Luwante (An Infant) v. Government Of Malaysia & Anor* [1977] 1 LNS 49; [1978] MLJ 92 as authority to support the respondents' case that their decision in rejecting the applicants' application for citizenship is non-justiciable.

[16] Further, Puan Maisarah argues that the second applicant failed to fulfil the requirements stipulated under art. 14(1)(b) of the Federal Constitution read together with the Second Schedule, Part II, s. 1(a) of the Federal Constitution necessary to acquire citizenship by operation of law. This is because the second applicant was born out of wedlock to a mother who is not a citizen or permanently resident in Malaysia at the time of her birth.

[17] Learned SFC also maintains that this court cannot make an order of *mandamus* directing the respondents to issue a Malaysian citizenship certificate and a MyKad identity card to the second applicant because the second applicant failed to satisfy the requirement in s. 44(1)(a) of the Specific Relief Act 1950 ("SRA").

[18] Section 44 of the SRA states that:

> (1) A Judge may make an order requiring any specific act to be done or forborne, by any person holding a public office, whether of a permanent or a temporary nature, or by any corporation or any court subordinate to the High Court:
>
> Provided that:
>
> (a) an application for such an order be made by some person whose property, franchise, or personal right would be injured by the forbearing or doing, as the case may be, of the said specific act;
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> (b) such doing or forbearing is, under any law for the time being in force, clearly incumbent on the person or court in his or its public character, or on the corporation in its corporate character;
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> (c) in the opinion of the Judge the doing or forbearing is consonant to right and justice;
>
> (d) the applicant has no other specific and adequate legal remedy; and
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> (e) the remedy given by the order applied for will be complete.

[19] Learned SFC argues that as an illegitimate child born to a non-citizen mother, the second applicant failed to show how her "personal right" would be injured if the respondents failed to register her as a Malaysian citizen. She cites the High Court cases of *Koon Hoi Chow v. Pretam Singh* [1972] 1 LNS 56; [1972] 1 MLJ 180b and *Ho Kooi Sang v. Universiti Malaya* [2004] 5 CLJ 445 as authority that "personal right" under s. 44(1)(a) of the SRA is a "legal right which is clear and well defined".

Acquisition Of Malaysian Citizenship

[20] Under Part III of the Federal Constitution, citizenship of Malaysia can be acquired in four different ways: (i) by operation of law; (ii) by registration; (iii) by naturalisation; and (iv) by incorporation of a new territory under the Federation.

[21] For purposes of this judgment, I set-out below the provisions in Part III of the Federal Constitution on the acquisition of citizenship (i) by operation of law and (ii) by registration.

Citizenship By Operation Of Law

[22] Article 14 of the Federal Constitution governs the acquisition of citizenship by operation of law. It is subject to the provisions of the articles in Part III of the Federal Constitution and Parts I, II and III of the Second Schedule to the Federal Constitution.

[23] For persons born before Malaysia Day, the requirements for citizenship by operation of law are specified in Part I of the Second Schedule. For persons born on or after Malaysia Day, the requirements for citizenship by operation of law are specified in Part II of the Second Schedule.

[24] Part III of the Second Schedule contains supplementary provisions relating to the citizenship. Article 31 of the Federal Constitution states that the provisions in Part III of the Second Schedule governs, among others, the interpretation of the articles in Part III of the Federal Constitution.

[25] Article 14(1) of the Federal Constitution reads as follows:

PART III

CITIZENSHIP

Chapter 1 – Acquisition of Citizenship

Citizenship by operation of law

14. (1) Subject to the provisions of this Part, the following persons are citizens by operation of law, that is to say:

(a) every person born before Malaysia Day who is a citizen of the Federation by virtue of the provisions contained in Part I of the Second Schedule; and

(b) every person born on or after Malaysia Day, and having any of the qualifications specified in Part II of the Second Schedule.

[26] Part II of the Second Schedule states in respect of citizenship by operation of law of persons born on or after Malaysia Day:

PART II

[Article 14(1)(b)]

CITIZENSHIP BY OPERATION OF LAW OF PERSONS BORN ON OR AFTER MALAYSIA DAY

1. Subject to the provisions of Part III of this Constitution, the following persons born on or after Malaysia Day are citizens by operation of law, that is to say:

A (a) every person born within the Federation of whose parents one at least is at time of the birth either a citizen or permanently resident in the Federation; and

(b) every person born outside the Federation whose father is at the time of the birth a citizen and either was born in the Federation or
B is at the time of the birth in the service of the Federation or of a State; and

(c) every person born outside the Federation whose father is at the time of the birth a citizen and whose birth is, within one year of its occurrence or within such longer period as the Federal Government may in any particular case allow, registered at a consulate of the
C Federation or, if it occurs in Brunei or in a territory prescribed for this purpose by order of the Yang di-Pertuan Agong, registered with the Federal Government; and

(d) every person born in Singapore of whose parents one at least is at the time of the birth a citizen and who is not born a citizen
D otherwise than by virtue of this paragraph; and

(e) every person born within the Federation who is not born a citizen of any country otherwise than by virtue of this paragraph.

2. (1) A person is not a citizen by virtue of paragraph (a), (d) or (e) of section 1 if, at the time of his birth, his father, not being a citizen,
E possesses such immunity from suit and legal process as is accorded to an envoy of a sovereign power accredited to the Yang di-Pertuan Agong, or if his father is then an enemy alien and the birth occurs in a place under the occupation of the enemy.

(2) In section 1 the reference in paragraph (b) to a person having been born
F in the Federation includes his having been born before Malaysia Day in the territories comprised in the States of Sabah and Sarawak.

(3) For the purposes of paragraph (e) of section 1 a person is to be treated as having at birth any citizenship which he acquires within one year afterwards by virtue of any provisions corresponding to paragraph (c) of
G that section or otherwise.

Illegitimate Children

[27] In relation to illegitimate children, Part III of the Second Schedule provides as follows:

H Interpretation

17. **For the purposes of Part III of this Constitution references to a person's father** or to his parent, or to one of his parents, **are in relation to a person who is illegitimate to be construed as references to his mother**, and accordingly section 19 of this Schedule shall not apply to
I such a person. (emphasis added)

Citizenship By Registration

[28] On the acquisition of citizenship by registration, art. 15(2) states that:

> (2) Subject to Article 18, the Federal Government may cause any person under the age of twenty-one years of whose parents one at least is (or was at death) a citizen to be registered as a citizen upon application made to the Federal Government by his parent or guardian.

[29] Article 15A of the Federal Constitution gives the Federal Government the power to register children under the age of 21 years as a Malaysian citizen. The article provides as follows:

> Subject to Article 18, the Federal Government may, in such special circumstances as it thinks fit, cause any person under the age of twenty-one years to be registered as a citizen.

[30] The provisions for citizenship by registration of children below 21 years in arts. 15(2) and 15A are subject to art. 18, which provides as follows:

> (1) No person of or over the age of eighteen years shall be registered as a citizen under this Constitution until he has taken the oath set out in the First Schedule.
>
> (2) Except with the approval of the Federal Government, no person who has renounced or has been deprived of citizenship under this Constitution or who has renounced or has been deprived of federal citizenship or citizenship of the Federation before Merdeka Day under the Federation of Malaya Agreement 1948 shall be registered as a citizen under this Constitution.
>
> (3) A person registered as a citizen under this Constitution shall be a citizen by registration from the day on which he is so registered.

Issues And Analysis

[31] The various arguments of parties in this instant case, can be distilled into two issues, namely:

(i) whether this court has the jurisdiction to entertain applications for an order of *certiorari* and for declarations in respect of citizenship, notwithstanding the ouster clause in s. 2 of Part III of the Second Schedule to the Federal Constitution? and

(ii) whether a child born out of lawful wedlock in Malaysia to a Malaysian citizen father and a non-citizen mother but who was subsequently legitimised under the Legitimacy Act 1961 by virtue of her parents' marriage, a Malaysian citizen by operation law under art. 14(1)(b) of the Federal Constitution?

Does This Court Have The Jurisdiction To Entertain Applications For An Order Of Certiorari And For Declarations Notwithstanding The Ouster Clause In S. 2 Of Part III Of The Second Schedule To The Federal Constitution?

[32] Learned SFC submits that the respondents' decisions under arts. 14, 15 and 15A, which are in Part III of the Federal Constitution are non-justiciable based on art. 31 and s. 2 of Part III of the Second Schedule to the Federal Constitution. She argues that by reason of the ouster clause in s. 2 of Part III of the Second Schedule, no appeal or review can be made against the Federal Government's decision in relation to applications for citizenship under arts. 15A, 14(1)(b) and 15(2) of the Federal Constitution. Learned SFC cites the decision of the High Court of Kuching in *Ku Luwante (An Infant) v. Government of Malaysia & Anor* [1977] 1 LNS 49; [1978] 1 MLJ 92 as authority.

[33] Section 2 of the Second Schedule, Part III of the Federal Constitution states that:

> 2. A decision of the Federal Government under Part III of this Constitution shall not be subject to appeal or review in any court.

[34] In *Ku Luwante*, Yusoff J addressed the issue of "whether the court is precluded from exercising its original jurisdiction in granting this declaration by reason of the 'ouster provision' in the Second Schedule of the Federal Constitution." His Lordship said:

> The effect of section 2 of Part Ill of the Second Schedule of the Federal Constitution (ouster provision) which purports to preclude the jurisdiction the court has been decided in a series of cases in our courts beginning with *Soon Kok Leong v. Minister of Interior, Malaysia* [1966] 1 LNS 183; [1968] 2 MLJ 88 and recently in the decision of the court in *Mak Sik Kwong v. Minister of Home Affairs, Malaysia* [1975] 1 LNS 96; [1975] 2 MLJ 168 and in the latter case, relevant authorities have been quite exhaustively dealt with. In those cases, the courts have held that this ouster provision does not preclude the courts from entertaining an application for an order of *certiorari* to quash the decision of a statutory tribunal where there was an error of law apparent on the face of the record.

[35] After a review of the relevant authorities, Yusoff J held that the ouster clause in s. 2 of Part III of the Second Schedule to the Federal Constitution does not preclude a court from considering a claim for declaration that an individual is a citizen. His Lordship held:

> For these reasons, **I am of the view that in a proper case, the court is not precluded by reason of the ouster provision only, to entertain a claim for declaration that an individual is a citizen**. But whether the court would entertain a claim for declaration that the plaintiff is eligible for registration as a citizen under a relevant provision of the Federal Constitution as it is sought in this case, involves different considerations and the court should also construe other provisions of the law relating to citizenship to determine the effect of such declaration.
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> (emphasis added)

[36] Additionally, in *Mak Sik Kwong v. Minister of Home Affairs Malaysia* [1975] 1 LNS 96; [1975] 2 MLJ 168, Abdoolcader J held that the ouster provision in the Second Schedule to the Federal Constitution did not preclude the court from entertaining an application for an order of *certiorari.* Abdoolcader J held:

> The Schedule provision [the ouster clause] was considered in two cases, and Ismail Khan J. (as he then was) in *Soon Kok Leong v. Minister of Interior, Malaysia* [1968] 2 MLJ 88 and Raja Azlan Shah J. (as he then was) in *In Re Soon Chi Hiang* [1969] 1 MLJ 218 both held (*albeit obiter* in the latter case) **that it does not preclude recourse to the courts by way of application for an order of *certiorari***, relying on and applying the *locus classicus* in this context, *Reg v. Medical Appeal Tribunal, Ex parte Gilmore* [1957] 1 QB 574 which has been treated in succeeding judgments as virtually holy writ of untouchable sanctity ...
>
> The courts act upon the presumption against the ouster of their jurisdiction in the absence of express and very clear provisions, and this presumption is enhanced where the question to be determined is one of private rights (Board of Governors of the *London Hospital v. Jacobs* [1956] 1 WLR 662) and the authority who is alleged to have been empowered by statute to determine the question exclusively is an administrative or other than judicial authority *(ibid).*
>
> ...
>
> I do not think there can be any doubt now that it is settled law that a finality or privative clause does not restrict in any way whatsoever the power of the courts to issue *certiorari* to quash for jurisdictional defect, error of law on the face of the record or manifest fraud. The same process of reasoning has even permitted the courts to interpret ouster clauses expressly referring to prohibition and *certiorari* and taking away the right to apply for such remedies as still permitting the grant of those remedies for lack of jurisdiction or the fraud must be manifest.
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> ...
>
> It is clear that the *raison d'etre* for the inroads into privative and ouster clauses is that the courts constitute the channel through which the King's justice is dispensed to his people and are accordingly the bastion of the rights of the individual. The courts must therefore necessarily be the ultimate bulwark against the excesses of the executive.
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> (emphasis added)

[37] In *Lim Jen Hsian & Anor v Ketua Pengarah Jabatan Pendaftaran Negara & Ors* [2017] 8 CLJ 412, the Court of Appeal held that the High Court Judge in that case had erred in ruling that s. 2 of Part III of the Second Schedule precludes the jurisdiction of the court. It held that the ouster clause in s. 2 does not absolutely preclude the jurisdiction of the court. Badariah Sahamid JCA in delivering the judgment of the Court of Appeal said as follows:

A [20] Firstly, the learned High Court Judge had misread *Ku Luwante*'s case. In *Ku Luwante (An Infant) v. Government of Malaysia & Anor* [1977] 1 LNS 49 ...

...

B [22] *In Ku Luwante's case, the finding of Justice Yusoff that the court has no jurisdiction to intervene was in respect of s. 4 of Part III of the Second Schedule, not the abovementioned s. 2. In addition, the finding was premised on the failure of the applicant to seek prior recourse to the Minister*. ...

[23] In *Ku Luwante*'s case, Justice Yusoff had referred to the case of *Mak Sik Kwong v. Minister of Home Affairs, Malaysia* [1975] 1 LNS 96; [1975]
C 2 MLJ 168, where Abdoolcader J was faced *inter alia* with the same issue of whether the ouster clause in s. 2 of Part III of the Second Schedule to the Constitution precludes the applicant from coming to court to seek an order of *certiorari*.

[24] Justice Abdoolcader held that the ouster provision in the Schedule
D to the Federal Constitution did not preclude the court from entertaining the application for an order of *certiorari*. Whether grounds for an order can be established and whether the application for *certiorari* will succeed are matters to be decided in the substantive motion itself.

[25] *Thus, on a careful consideration of the authorities abovementioned, we are of*
E *the view that s. 2 of Part III of the Second Schedule to the Constitution does not absolutely preclude the jurisdiction of the court*.

(emphasis added)

[38] In *Madhuvita Janjara Augustin (Suing Through Next Friend, Margaret Louisa Tan) v. Augustin Lourdsamy & Ors* [2018] 4 CLJ 758, the Court of
F Appeal held that the presence of an ouster clause s. 2 of Part III of the Second Schedule to the Federal Constitution, is not the same as saying that matters concerning citizenship or immigration as "non-justiciable."

[39] Like this instant case, the child in *Madhuvita* was born out of wedlock to her Malaysian citizen father and foreign citizen mother. The child was
G registered as a non-citizen at birth. Her parents subsequently married after her birth. Her father applied for citizenship for her under art. 15A of the Federal Constitution and was rejected by the Federal Government. The High Court held that since her parents were not married to each other at the time of her birth, she did not qualify for citizenship under the Federal
H Constitution.

[40] The subject matter of appeal before the Court of Appeal in *Madhuvita* was whether she may be granted citizenship under art. 14(1)(b) of the Federal Constitution. The Court of Appeal held that the said subject matter of the appeal was "entirely justiciable and within the purview of the court." Mary
I Lim JCA in delivering the judgment of the Court of Appeal held that:

[27] Section 2 above stands as an ouster clause. Parliament, in all its wisdom has seen it fit that decisions of the Federal Government under Part III of the Federal Constitution are not to be subject to appeal or

review in any court. **Now, as an ouster clause, and that will include such a clause cited in the Federal Constitution, which serves to limit and oust the jurisdiction of the court, s. 2 must be read strictly**. This is because the courts guard its jurisdiction and powers responsibly and for many more good reasons which do not require examination or expansion for the present purposes.

[28] **It is quite clear from the carefully worded terms of s. 2 that the scrutiny of the court is only excluded where it concerns a decision of the Federal Government made under Part III of the Federal Constitution**. It is apparent from the records of appeal that the court was not moved to hear an appeal or review of any decision made by the Federal Government under Part III, and that includes the Federal Government's rejection of the appellant's application for citizenship under art. 15A. That decision of the Federal Government is not under challenge. In fact, no decision of the Federal Government is in the facts of the present appeal. It is further clear from the cause papers and submissions before us that the decision of the Federal Government under art. 15A in respect of the appellant remains with the Executive Government.

[29] *But, that is not to say that the court may not refer to that decision in the course of its deliberations on the appellant's application. Neither can it be right nor may it be suggested to be the intention of Parliament as set out in s. 2 above, that the court cannot make any pronouncements on citizenship under Part III of the Federal Constitution. Matters concerning citizenship, as are a whole host of other subject matters found in the Federal Constitution are within the purview of the courts. It is only the decisions of the Federal Government under Part III that are not open to appeal or review in any court*.

[31] We observed that the learned judge agreed with the submissions of the learned SFC that the matter before her is non-justiciable. Before leaving this first issue, we must correct the use of the term, "non-justiciable".

[32] **The presence of an ouster clause of some degree or extent in its application found in s. 2 of Part III of the Second Schedule is to our minds, not the same as saying that the matter is non-justiciable**. Although the decisions in *Ku Luwante (An Infant) v. Government of Malaysia & Anor* [1977] 1 LNS 49; [1978] MLJ 92; *Andrew s/o Thamboosamy v. Superintendent of Pudu Prisons, Kuala Lumpur* [1976] 1 LNS 5; [1976] 2 MLJ 156; and *Re Meenal w/o Muniyandi* [1979] 1 LNS 89; [1980] 2 MLJ 299 have been cited in support of this proposition, a careful reading of the same do not hold true. What those cases, in fact, say is that "The laws on citizenship and immigration rest solely on questions of public policy"; that "Under the Immigration Ordinance, only the executive has power to release the appellant. Whether or not the executive should do so is a matter of policy for them, they have information and sources of information not available to the court and are moved by political, economic, social and cultural considerations which the court is not well equipped to apply, and judges should be slow to embarrass them into any course of action." *None of the cases cited equated the existence of ouster clauses, or matters concerning citizenship or immigration as "non-justiciable". The courts*

> *merely alluded to the fact that the court should be slow to enter into these areas for the subject matters of immigration and citizenship are often fraught with policy, political and administrative considerations. An example of a non-justiciable matter would be clemency or pardon where such matters are within the prerogative of the Ruler of the realm and where mercy begins*. A quick thumb through the law journals will readily yield results showing many challenges taken on immigration and citizenship matters. The success or otherwise of these challenges have not been for reasons of non-justiciability.
>
> ...
>
> [34] **In the present appeal, the subject matter is entirely justiciable and within the purview of the court**.
>
> (emphasis added)

[41] To my mind, it is clear from reading Yusoff J's decision in *Ku Luwante*, that contrary to the submission of learned SFC in this instant case, His Lordship held in *Ku Luwante* that the court is not precluded by reason of the ouster provision only in s. 2 of Part III of the Second Schedule to the Federal Constitution to entertain a claim for declaration.

[42] It is also clear to me, that the Court of Appeal in *Lim Jen Hsian* and *Madhuvita* had expressly held that s. 2 of Part III of the Second Schedule to the Federal Constitution does not absolutely preclude the jurisdiction of the court.

[43] Moreover, in *Mak Sik Kwong v. Minister of Home Affairs Malaysia (supra)*, Abdoolcader J held that the ouster provision in the Second Schedule to the Federal Constitution did not preclude the court from entertaining an application for an order of *certiorari*. Abdoolcader J's decision in *Mak Sik Kwong* was cited with approval by Yusoff J in *Ku Luwante* and by the Court of Appeal in *Lim Jen Hsian* and *Madhuvita*.

[44] As observed by the Court of Appeal in *Lim Jen Hsian*, Yusoff J in *Ku Luwante* held that that the court has no jurisdiction to intervene with the Minister's power to delegate in s. 4 of Part III of the Second Schedule, and not with s. 2.

[45] Section 4(1) of Part III of the Second Schedule reads as follows:

> 4. (1) *The Minister may delegate to any officer of the Federal Government or, with the consent of the Ruler or Yang di-Pertua Negeri of any State, to any officer of the Government of that State, any of his functions under Part III of this Constitution or this Schedule relating to citizenship by registration and the keeping of registers*, and, in relation to orders under paragraph (c) of Clause (1) of Article 25 or under Article 26, any of his functions under Article 27 prior to determining whether to make such an order; **but any person aggrieved by the decision of a person to whom the functions of the Minister are so delegated may appeal to the Minister**.
>
> (emphasis added)

[46] The facts in this instant case show that the first applicant's application for citizenship in JPN's Borang B was only for citizenship by registration under art. 15A. Accordingly, the respondents' impugned decision was to reject the application for citizenship by registration under art. 15A of the Federal Constitution. Since the first applicant did not make any applications for citizenship under arts. 14(1)(b) and 15(2), no decision can therefore be made by the respondents to reject applications under these articles. It follows that it is not possible to reject an application which is not made.

[47] Therefore, I must respectfully disagree with the learned SFC's submission that the respondents' decision to reject the application were made under arts. 14, 15 and 15A of the Federal Constitution. For the above reasons, I find that the respondents' decision to reject the application for citizenship was made only under art. 15A of the Federal Constitution.

[48] The applicants in this instant case applied, among others, for an order of *certiorari* to quash the first respondent's impugned decision and for declarations that the second applicant is a citizen of Malaysia by operation of law under art. 14(1)(b) of the Federal Constitution and that she has a legitimate expectation to acquire Malaysian citizenship.

[49] For the above reasons, I find that notwithstanding the ouster clause in s. 2 of Part III of the Second Schedule to the Federal Constitution, this court has the jurisdiction to consider the applicants' application for an order *certiorari* to quash the respondents' decision and for the declarations sought.

[50] Moreover, as the respondents did not make any decision of the second applicant's citizenship by operation of law under art. 14(1)(b) of the Federal Constitution, it follows that there is no review by this court in this instant case of any decision made by the respondents under art. 14(1)(b).

Is A Child Born Out Of Lawful Wedlock In Malaysia To A Malaysian Citizen Father And A Non-citizen Mother But Who Was Subsequently Legitimised Under The Legitimacy Act 1961, A Malaysian Citizen By Operation Law Under Art. 14(1)(B) Of The Federal Constitution?

[51] One of the arguments put forward by the respondents is that a declaration of legitimacy is required under the Legitimacy Act 1961 to legitimise the second applicant.

[52] Learned SFC argues that as no order for legitimacy was made by the second applicant's parents after their marriage, she is considered an illegitimate person to date. Learned counsel for the applicants countered the argument by saying that pursuant to s. 3 of the Legitimacy Act 1961 and the Court of Appeal's decision in *Madhuvita*, the second applicant was legitimised from the date of her parents' marriage and it was not necessary to obtain a declaration of legitimacy to legitimise her.

[53] Section 3 and s. 4 of the Legitimacy Act 1961 read as follows:

> 3.(1) Nothing in this Act shall operate to legitimate a person unless the marriage leading to the legitimation was solemnised and registered in accordance with:
>
> (a) the Civil Marriage Ordinance 1952* [Ord. No. 44 of 1952], or the Christian Marriage Ordinance 1956* [Ord. No. 33 of 1956];
>
> (b) the Christian Marriage Ordinance* [Cap. 24] or the Marriage Ordinance 1959* [Ord. No. 14 of 1959], of Sabah; or
>
> (c) the Church and Civil Marriage Ordinance of Sarawak* [Cap. 92],
>
> or any Enactment or Ordinance repealed by any of the said Ordinances.
>
> 4. Subject to section 3, *where the parents of an illegitimate person marry or have married one another, whether before or after the prescribed date, the marriage shall, if the father of the illegitimate person was or is at the date of the marriage domiciled in Malaysia, render that person, if living, legitimate from the prescribed date or from the date of the marriage, whichever is the later*.
>
> (emphasis added)

[54] The Ordinances listed in s. 3 of the Legitimacy Act 1961 have since been repealed by the s. 109 of the Law Reform (Marriage and Divorce) Act 1976 through Act A498 with effect from 15 August 1980. Therefore, for marriages registered from 15 August 1980, the Law Reform (Marriage and Divorce) Act 1976 applies. Section 2 of the Legitimacy Act 1961 defines "prescribed date" for the States of Perak, Selangor, Negeri Sembilan and Pahang as 1 January 1933. The "date of legitimation" as the date of the marriage leading to the legitimation or, where the marriage occurred before the prescribed date.

[55] In *Madhuvita* (*supra*) the Court of Appeal held that the appellant was no longer illegitimate by reason of legitimation by the subsequent marriage of her parents. Mary Lim JCA in delivering the judgment of the Court of Appeal held as follows:

> [64] In the present appeal, the parents of the appellant have married each other since 23 January 2006. Their marriage has been properly solemnised and recognised under s. 3 of Act 60. Where that happens, s. 4 of Act 60 applies ...
>
> [65] *With the clear terms of s. 4, the appellant is rendered legitimate by the subsequent marriage of her parents and that legitimation is from the date of the marriage*, that is, from 23 January 2006. *From the language and terms of s. 17, the appellant's legitimacy or illegitimacy is questioned at the time of the consideration of the application, and not some other point in time.*
>
> [66] As a legitimate person from 23 January 2006, s. 17 does not apply. Section 17 only applies where the person is illegitimate. Since there is legitimation of the appellant, s. 17 does not apply. As a legitimate person,

the appellant is entitled to rely on her father's citizenship in which case, the appellant has quite clearly fulfilled the requirements of art. 14(1)(b) read with s. 1(a) of Part II of the Second Schedule.

(emphasis added)

[56] The second applicant's parents registered their marriage under the Law Reform (Marriage and Divorce) Act 1976 on 31 January 2008. Applying the decision of the Court of Appeal in *Madhuvita* to this present case, the second applicant was rendered legitimate pursuant to s. 3 and s. 4 of the Legitimacy Act 1961 upon the registration of her parents' marriage. Therefore, I find that the second applicant was rendered legitimate on 31 January 2008. Further, I find that it would not be necessary for the second applicant to apply to the High Court for a decree declaring that she is the legitimate child of her parents.

[57] The Court of Appeal in *Madhuvita* held that s. 17 of Part III of the Second Schedule to the Federal Constitution only applies at the time of the consideration of the application. It held that:

[f]rom the language and terms of s. 17, **the appellant's legitimacy or illegitimacy is questioned at the time of the consideration of the application**, and not some other point in time.

(emphasis added)

[58] We do not know when the first respondent considered the first applicant's applications, but we know when the first applicant made his applications and when the first respondent made his decisions. The facts show that the first applicant made the applications and the first respondent made his decisions after the first applicant's marriage to the second applicant's mother. Additionally, as discussed above, the applications to first respondent in JPN's Borang B were only for citizenship by registration under art. 15A of the Federal Constitution.

[59] The application for a declaration that the second applicant is a citizen of Malaysia by operation of law under art. 14(1)(b) of the Federal Constitution is made to this court by the applicants in this instant case ie, after the first applicant's marriage to the second applicant's mother.

[60] I find that the second applicant as a person rendered legitimate by virtue of s. 3. and s. 4 of the Legitimacy Act 1961 is entitled to rely on the first applicant's citizenship for purposes of art. 14(1)(b) and s. 1(a) of the Second Schedule, Part II of the Federal Constitution. As a legitimate person, the provisions in s. 17 of Part III of the Second Schedule no longer apply. The references to the second applicant's father for the purpose of Part III of the Federal Constitution are no longer construed as references to her mother.

[61] Accordingly, I find that the second applicant had fulfilled the requirements for citizenship by operation of law under art. 14(1)(b) and s. 1(a) of Part II of the Second Schedule to the Federal Constitution.

[62] The learned SFC had submitted that this court cannot make an order of *mandamus* directing the respondents to issue a Malaysian citizenship certificate and a MyKad identity card to the second applicant because the second applicant failed to satisfy the requirement in s. 44(1)(a) of the Specific Relief Act 1950 in that as an illegitimate child, the second applicant failed to show how her "personal right" would be injured if the respondents failed to register her as a Malaysian citizen.

[63] With respect, I am unable to agree with the learned SFC's submission. I find that as a child who had been rendered legitimate pursuant to the Legitimacy Act 1961 by virtue of her parents' marriage, the second applicant has a personal right to be a Malaysian citizen by operation of law under art. 14(1)(b) and s. 1(a) of Part II of the Second Schedule to the Federal Constitution.

[64] For this reason, I find that the second applicant's personal right as person who is entitled to citizenship by operation of law would be injured if the respondents fail to issue her a Malaysian citizenship certificate and a MyKad identity card. Therefore, the requirement in s. 44(1)(a) of the Specific Relief Act 1950 is accordingly satisfied. Hence, I find that this court has the jurisdiction to make an order of *mandamus* directing the respondents to issue a Malaysian citizenship certificate and a Malaysian MyKad identity card to the second applicant.

[65] Additionally, by reason of her legitimisation, I also find that the second applicant has a legitimate expectation to acquire a citizenship of Malaysia and to own rights as a Malaysian citizen.

[66] With regards to the applicants' application for an order of *certiorari* to quash the first respondent's impugned decision, as discussed above, the impugned decision was not to register the second applicant as a citizen under art. 15A of the Federal Constitution.

[67] The Federal Government has the prerogative under art. 15A to grant citizenship by registration to any person below the age of 21 years "in such special circumstances as it thinks fit". Such decision of whether or not to grant citizenship by registration to a child under the age of 21 years is solely that of the Federal Government bestowed upon it by art. 15A of the Federal Constitution.

[68] Therefore, based on the decisions in *Ku Luwante* and *Madhuvita*, I find that pursuant to s. 4 of Part III of the Second Schedule to the Federal Constitution, this court does not have the jurisdiction to make an order of *certiorari* to quash the Federal Government's decision under art. 15A not to cause a child under the age of 21 years to be registered as a citizen. This is because such decision is the sole prerogative of Federal Government, which is dependent on whether the Federal Government decides that there are

"such special circumstances as it thinks fit" to register a person under 21 years as a citizen. The correct avenue for appeal, pursuant s. 4 of Part III of the Second Schedule, is for the applicants as the persons aggrieved by the decision of the first respondent to appeal to the Minister.

[69] Based on this finding that the Federal Government has the sole prerogative to grant citizenship by registration to children below 21 years under art. 15A, I accordingly find that the respondents' decision in not using that prerogative power to accord the second applicant citizenship by registration pursuant to art. 15A is not unconstitutional.

[70] Therefore, this court dismisses the applications for an order of *certiorari* to quash the first respondent's decision under art. 15A dated 5 August 2016 and for damages.

Decision

[71] For the above reasons, it is hereby declared that the second applicant is a Malaysian citizen by operation of law under art. 14(1)(b) and s. 1(a) of Part II of the Second Schedule to the Federal Constitution.

[72] An order of *mandamus* is hereby made for the respondents to issue the second applicant with a Sijil Kewarganegaraan Malaysia (Malaysian citizenship certificate) and a Kad Pengenalan MyKad Malaysia (Malaysian MyKad identity card).

[73] There is no order as to costs.